IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 516 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MEHTA PRAFULCHANDRA KALIDAS - Applicant(s)

Versus

PATEL CHELJIBHAI KALIDAS & 1 - Respondent(s)

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Appearance :
MR DM THAKKAR for petitioner(s) : 1,
MR SHRIKAR H BHATT for Respondent(s) : 1,
MR HM PRACHCHHAK APP for Respondent(s) : 2,
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 29/09/2005

ORAL JUDGMENT

1. Rule. Mr. Shrikar H. Bhatt, learned advocate appears and waives service of notice of rule on behalf of respondent No.1 whereas Mr. HM Prachchhak, learned App appears and waives service of notice of rule on behalf of respondent No.2 – State of Gujarat.

2. By instant Criminal Revision Application filed under Section 397 read with Section 401 of the Code of Criminal Procedure ('the Code' for short), the petitioner seeks to challenge the order dated 11.4.2005 recorded below application Ex.6, in Criminal Case No. 865 of 2004 by the learned Judicial Magistrate, First Class, Idar, by which the proceedings of complaint filed by the petitioner against respondent No.1 for commission of the alleged offence under Section 138 of the Negotiable Instruments Act ('the Act'

for short) has been ordered to be stopped under Section 258 of the Code and respondent No.1 has been acquitted of the offence under Section 138 of the Act and also notice under Section 250 of the Code has been issued to the petitioner to show cause as to why compensation of Rs.5,000/- should not be awarded from him to respondent No.1 for abuse of process of court in filing false complaint.

3. As per the case of the petitioner, he has filed criminal complaint being Criminal Case No.865 of 2004 in the Court of learned Judicial Magistrate, First Class, Idar against respondent No.1/accused for commission of alleged offence under Section 138 of the Act. As per the case of the petitioner, respondent No.1 had purchased some ornaments from the jewellery shop of the petitioner on 15.4.2004 and he was liable to pay Rs.1,40,000/- to the petitioner for purchasing the said ornaments. Respondent No.1 had, upon the

demand of the said amount, issued a cheque dated 15.5.2004 for Rs.1,40,000/- drawn on Sabarkantha District Cooperative Bank, Kanpur. The said cheque was dishonoured for insufficient funds. The petitioner, therefore, had given a notice by Registered Post A.D. And U.P.C. through advocate on 28.5.2004. Respondent No.1 had, instead of paying the amount of the cheque within 15 days from the receipt of the notice, given an evasive reply to the notice and therefore the petitioner was constrained to file the complaint against respondent No.1 for commission of the alleged offence under Section 138 of the Act.

3. In the said complaint, respondent No.1 filed an application under Section 258 of the Code for dropping the proceedings on various grounds. The learned Magistrate passed the impugned order on 11.4.2005 by which the application filed by respondent No.1 is allowed and thereby the proceedings of complaint filed by the petitioner

against respondent No.1 for commission of the alleged offence under Section 138 of the Negotiable Instruments Act ('the Act' for short) has been ordered to be stopped under Section 258 of the Code and respondent No.1 has been acquitted of the offence under Section 138 of the Act and also notice under Section 250 of the Code has been issued to the petitioner to show cause as to why compensation of Rs.5,000/- should not be awarded from him to respondent No.1 for abuse of process of court in filing false complaint, which has given rise to the instant revision application at the instance of the original complainant.

5. This Court has considered the submissions advanced by Mr. D.M. Thakkar, learned advocate of the petitioner, Mr. Shrikar Bhatt, learned advocate for respondent No.1 and Mr. HM Prachchhak, learned APP for respondent No.2 – State of Gujarat, perused the averments made in

the revision application, considered the impugned order as well as statutory provisions contained under the Code and the Act.

6. There is no dispute that a complaint was filed by the petitioner against respondent No.1 for commission of alleged offence under Section 138 of the Act. This case was to be conducted as summons trial as offence under Section 138 of the Act is punishable with imprisonment for a term which may be extended to two years or with fine or with both. The trial of summons case by the Magistrate is prescribed in Chapter XX of the Code and as per the said Chapter, there is no stage for passing order of discharge of the accused from the prosecution. Section 258 of the Code is in relation to power to stop proceedings in certain cases, which reads as under:

> “In any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of

the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge."

7. Provisions of the aforesaid section in terms stipulate that section 258 of the Code can be attracted only in cases other than on a complaint, meaning thereby, if the prosecution is filed by the State then this section shall be attracted. In the instant case the complaint is filed by a private party and, therefore, according to this court, provisions of this section cannot be attracted.

8. On perusal of the impugned order, it is seen that the learned Magistrate has relied upon certain judgments of this Court. The learned Magistrate has misinterpreted those judgments as those judgments are delivered by this Court in a quashing proceeding in exercise of powers under Section 482 of the Code. The powers under Section 482 of the Code cannot be exercised by the learned Magistrate.

9. In the case of John Thomas v. Dr. K. Jagadeesan, (2001) 6 SCC 30, the Supreme Court has held as under:

> “Summons cases are generally of two categories: those instituted upon complaints and those instituted otherwise than upon complaints. The latter category would include cases based on police reports. Section 258 of the Code is intended to cover those cases belonging to one category alone i.e.,

“summons cases instituted otherwise than upon complaints”. Thus it has no application to cases instituted upon complaints.

The segment separated at the last part of the section by the words “and in any other case” is only a sub-category or division consisting of “summons cases instituted otherwise than upon complaints”. That sub-category is not intended to cover all summons cases other than those instituted on police report. In fact, Section 258 vivisects only “summons cases instituted otherwise than on complaints” into two divisions. One division consists of cases in which no evidence of a material witness was recorded. The section permits the court to acquit the accused prematurely only in those summons cases instituted otherwise than on complaints wherein the evidence of material witnesses was recorded. But the power of the court to discharge an accused at midway stage is

restricted to those cases instituted otherwise than on complaints wherein no material witness was examined at all."

10. Applying the principles laid down by the Supreme Court in the above referred to judgment to the facts to the present case, at the cost of repetition, be it stated that the complainant has filed the complaint under Section 138 of the Act which is punishable for maximum period of imprisonment of two years or with fine or with both. Therefore, the learned Magistrate has to conduct the complaint filed by the complainant as a summons trial, the procedure of which is prescribed under Section XX of the Code wherein there is no stage for discharging the accused from prosecution in the midst of the trial and the power of the Court to exercise this power is restricted to those cases instituted otherwise than on complaints wherein no material witness was examined at all. Admittedly, the complaint

filed by the complainant is not a case instituted otherwise than on complaint. Therefore, the learned Magistrate has misinterpreted Section 258 of the Code and wrongly discharged respondent No.1 from the prosecution.

11. Besides this also, the learned Judicial Magistrate, First Class, Idar, has held that the complaint filed by the petitioner is false complaint and, therefore, he has abused the process of court. For coming to this conclusion, the learned Judicial Magistrate, First Class, Idar has considered the averments made in application Ex.6 wherein certain defences have been raised by respondent No.1 indicating some transaction which took place between him and the petitioner/complainant with regard to Ambassador car. According to this court, these are all defences raised in the application Ex.6. It is settled principle of law that defences raised at

pre-trial stage cannot be used either for quashing of the complaint or for dropping of the proceedings even it is instituted otherwise than upon a complaint, meaning thereby, instituted by the State without being tested in the trial so that the other side can have a valid right of cross-examining the witnesses or the said defences can be countered by examining prosecution witnesses. Notwithstanding the aforesaid statutory legal position, the learned Judicial Magistrate, First Class, Idar, has accepted the averments made in the application Ex.6, which according to this court, are defences as truth without being tested in the trial. Therefore, on merits also the impugned order suffers from the vice of non-application of mind and against the settled principles of law, which deserves to be quashed in exercise of the powers conferred under Section 397 of the Code.

12. In aforesaid view of the matter, according to this Court, the learned Judicial Magistrate, First Class, Idar has committed serious and grave illegality and infirmity in passing the impugned order which does not stand to scrutiny.

13. Seen in the above context, the impugned order deserves to be quashed and set aside by allowing this revision application.

14. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The impugned order dated 11.4.2005 recorded below application Ex.6 in Criminal Case No.865 of 2004 by the learned Judicial Magistrate, First Class, Idar is hereby quashed and set aside, the result of which is that Criminal Case No.865 of 2004 is ordered to be restored to its original file. The concerned learned Judicial Magistrate, First Class, Idar is hereby directed to proceed with the trial of the said case and dispose it of as

expeditiously as possible as per the time limit prescribed under Section 138 of the Act.

Rule is made absolute.

(A.M. Kapadia, J.)

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